OWEN KELLY, **CARRIGAN HOMES, INC.**	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Appellant	:	HEARING EXAMINER
vs.	:	BA Case No. 621-D
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND		
Appellee		

::

DECISION AND ORDER

On January 14, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the departmental appeal of Owen Kelly, Carrigan Homes, Inc. (the "Appellant"). The Appellant is appealing a Decision and Order of the Department of Planning and Zoning ("DPZ") in Administrative Adjustment Case No. 07-22 dated September 27, 2007 denying an administrative adjustment to reduce the 50-foot front setback from a public road right-of-way to 45 feet for a new dwelling in an R-20 (Residential: Single) Zoning District. The appeal is filed pursuant to Section 100.F.3 of the Howard County Zoning Regulations (the "Regulations").

The Appellants certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Richard Talkin, Esquire, represented the Appellant. Tom MacElroy testified on behalf of the Appellant. Eugene Rutter, Keith Kuhlemier, and Harold Sachs were permitted to testify

pursuant to *Jacob Hickmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306(2002).[1]

Section 100.F.3 provides that appeals of administrative adjustment decisions be heard on a de novo basis.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The Appellant is the builder of the dwelling on the subject property, which Creighton E. Northrop III owns. It is located on the west side of Spring Meadow Drive about 1,500 feet south of Frederick Road and west of Chatham Road and known as 3746 Spring Meadow Drive (the "Property"). The Property is referenced on Tax Map 24, Block 10, as Parcel 1108 and Lot 48.

2. The .60-acre Property is irregularly shaped. The foundation location survey dated July 24, 2007 and attached to the petition does not provide the width of the curving frontage, but it appears to be at least twice at wide as the rear lot line, which is about 70 feet. The lot is about 200 feet deep. It is improved with a single-family detached dwelling, which at its closest point is 46.9 feet from the public street right of way and 19.95 feet from the southeastern side lot line.

3. According to the location survey, part of the back section lies within a 100- year floodplain. On my visit to the Property, it appeared that a stream runs through this floodplain.

---

[1] Although it is long-standing policy not to permit testimony from non-parties in administrative appeals, I permitted these persons to testify without entering their appearance as parties. *Jacob Hickmat v. Howard County* suggests the Hearing Authority may permit potentially aggrieved parties to testify in appeals concerning DPZ decisions. In that case, the Court of Special Appeals upheld the circuit court's decision to allow nearby property owners with inadequately represented and protectible interests to intervene in DPZ's appeal of a Board of Appeals decision to reverse and deny a DPZ waiver of the Subdivision Regulations to permit disturbance of a stream and buffer area, where the Board had denied the property

4. Access to the Property is gained from a driveway off Spring Meadow Drive and accessing the attached garage on the south side of the dwelling.

5. Because the front five feet of the garage encroaches into the 50-foot front setback from a public road right-of-way, it violates Section 108.D.4.b(1)(a)(ii).

6. Vicinal properties are also zoned RC-20. According to Appellant's Exhibit 1, which depicts the area within the building restriction lines for Lots 12, 13, 14, 23, 33, 35, 44, 48, and 49, the adjoining properties are improved with single-family detached dwellings. No additional information about lots is provided. On my site visit, I determined the properties along this side of Spring Meadow Drive are improved with single-family detached dwellings fronting on this street.

7. Mr. MacElroy, an engineer with the RBA Engineering Group, testified Carrigan Homes hired his firm to perform engineering services for the construction. During some point in the preparation of the plans, an RBA employee shifted some values (the Maryland state grid) in an underlying layer in their computer-aided design and drafting system ("CADD"). The shifted values moved the position of the house. The surveyors then used the changed underlying values in the field to stake the building location five feet out. Carrigan Homes then used the stakes to construct the dwelling's foundation. He also stated the error was not the fault of Carrigan Homes or the property owner. The survey crew discovered the error, notified the homebuilder and then the county.

8. He also stated that DPZ issued a stop-work order after the administrative adjustment application was denied. The only work done before the administrative adjustment hearing was

---

owners the right to testify pursuant to County policy.

pouring the foundation and just before the hearing, backfilling the foundation. In response to my question as to whether the garage could be moved back, he stated that the floor, plumbing, and electrical plans were completed and that it therefore would not be economically feasible to redesign the dwelling.

9. He testified the lot was very restricted, which severely limits the building envelope. Referring to Appellant's Exhibit 1, he testified that lots 33, 35, and 48 were smaller because they were resubdivisions requiring a 35-foot floodplain setback. Referring to Exhibit 1, he testified that the total area of the garage encroachment is less than 100 feet and that Lot 49's building envelope is smaller than the dwelling because the recorded plat was re-recorded.

10. He also stated that the dwelling on Lot 49 is set back 40 feet under an earlier 40-foot setback requirement and that Spring Meadow Drive was constructed before 1993.

11. In his opinion, the reduced setback would not alter or be detrimental to the character of the neighborhood, change traffic conditions, or the building and growth of the neighborhood.

12. It was also his opinion that the house (including a two-story garage) as designed was one-half to one foot from the front and back building restriction lines, which is unique. It was his opinion that a practical difficulty would arise if the garage were not permitted because the dwelling would not be consistent with neighboring dwellings.

13. It was Eugene Rutter's testimony that the Appellant should conform to county rules and that the floor plan could have been modified before the problem was discovered. Keith Kuhlemier testified the problem could have been prevented by stepping off the setback. Harold Sachs testified Lot 33 was not depicted accurately, that the floodplain was inaccurately depicted on Lot 48, and that its dwelling is larger than neighboring houses.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows.

1. The Applicable Setback. The Appellant claims in error in the petition's supplemental statement that the applicable setback is 40 feet. Under 108.D.4.a(1)(a)(i), the front setback from an arterial or collector public street right-of-way for lots recorded after October 18, 1993 that do not have frontage on a public street constructed before that date is 50 feet.[2] As the evidence shows, the 50-foot setback applies here, Mr. MacElroy having testified that Spring Meadow Drive was constructed before 1993.

2. Administrative Adjustment Variance Standards. Section 100.F.1 of the Regulations provides that an administrative adjustment is subject to the same standards applicable to the "same limitations, guides, and standards" applicable to variances grant by the Board of Appeals. According to the Appellant, the controlling standards for my determination as whether the requested administrative adjustment variance should be granted are the general "Limitations, Guides and Standards" set forth in Section 130.C. Although this phrase from Section 100.F.1 is evidently repeated verbatim in Section 130.C, the applicable criteria are those set forth in Section 130.B.2 of the Regulations, which provides that a variance may be granted only if all the following determinations are made.

> a. The Hearing Authority shall have the authority to grant variances from the parking requirements and bulk regulations established in these regulations, excluding density and minimum lot size requirements, where all of the following determinations are made:
>
> (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot or shape, exceptional topography, or other existing features peculiar

[2] For all other public street rights-of-way without such frontage, the setback is 30 feet. Section 108.D.4.a(1)(a)(ii). If Spring Meadow Drive were neither an arterial nor a collector public street, the applicable setback would be 30 feet, not 40 feet.

> to the particular lot; and that as a result of such unique physical conditions, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
>
> (2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.
>
> (3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.
>
> (4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum variance necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance does not comply with Sections 130.B.2.a(1) and (3), and therefore must be denied.

3. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach,* 22 Md. App. 28, 322 A.2d 220 (1974).

4. With respect to the first prong of the variance test, the Maryland courts have defined "uniqueness" thus:

> In the zoning context, the 'unique' aspect of a variance requirement *does not refer to the extent of improvements upon the property*, or upon neighboring property. 'Uniqueness' of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls.

North v. St. Mary's County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994). (Italics added.)

5. In this case, the Appellant has not shown the Property is in any way unique such that the front setback requirement will disproportionately impact it. The Property is generally the same size when compared to Lot 35 and its overall size does not pose a practical difficulty in complying with the front setback requirement. Most important, the Appellant presented no factual evidence or testimony that neighboring lots are larger or that the Property has unique characteristics not shared by other properties. Based on my site visit and Exhibit 1, the rear sections of most, if not all, the neighboring rear lots on this side of Spring Meadow Drive appear to lie in the floodplain. As such, these properties are subject to the 35-foot floodplain setback.

6. Although the Appellant also argues the historical changes in front setbacks along this section of the Drive cause the Property to be unique, this uniqueness is a function of the date the Property was resubdivided, not any inherent unique characteristic. Nor is the smaller size of the building envelope a unique characteristic, as it is a consequence of the overall lot configuration, not an inherent difference.

7. The Property having no unique characteristic, no practical difficulties or unnecessary

hardships arise in complying strictly with the bulk provisions of the Regulations. As the findings above evince, the sole practical difficulty arising from the Appellants' compliance with the front public street right-of-way setback is the added economic cost of reconstructing the foundation to comply with the setback and revising floor, plumbing, and electrical plans.

8. The Property Owner (apparently) initially chose to construct a dwelling the size of which is such that it would sit one to one and one-half feet from the front and rear building restriction lines. It is only that he chose to construct a dwelling of a certain size and design in a tight building envelope that a "difficulty" arises. This case presents the unusual circumstance of an Appellant and property owner who want to construct a dwelling on a lot with a small building envelope only to later claim practical difficulties in complying with what they chose to create. Consequently, the Appellant has not produced sufficient evidence to pass the first prong of the variance test; that is, it has not shown the Property has any unusual or unique characteristic relative to the front public street right-of-way setback to impact it disproportionately.

9. In addition, the Petitioner's request does not pass the second prong. The Petitioner is not unreasonably prevented from making a permitted use of the Property because a conforming dwelling may be constructed on the property and still comply with the setback requirement. For these reasons, the variance request fails to comply with Section 130.B.2.a(1).

10. Section 130.B.2.a(3) of the Zoning Regulations requires that any practical difficulty in complying with the setback requirement may not have been created by the owner. Most often, this "self-created hardship" rule comes into play when the owner has already constructed something on the property that violates the applicable zoning regulations, then requests relief from the regulation in order to avoid the hardship of removing the structure. See, e.g., *Cromwell*

v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995); *Evans v Shore Communications,* 112 Md. App. 284, 685 A.2d 4554 (1996); and *Ad+Soil, Inc. v. County Commissioners of Queen Anne's County,* 307 Md. 307, 513 A.2d 893 (1986). Because the practical difficulty in these cases arose from actions of the Appellant and landowner, and not as a result of the disproportionate impact of the zoning regulations on the particular property, the cases failed the test for variances.[3]

This is precisely the situation in this case. The Maryland courts have made it clear that whether the hardship was inflicted intentionally or unintentionally is irrelevant; if it was the result of the owner's action or that of a predecessor in title, the variance must be denied. *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 214 A.2d 810 (1965); *Cromwell*, 651 A.2d at 441. Although there was testimony in this case that the situation was not created by the Appellant or the property owner, an RBA employee made the CADD error leading to the garage encroaching on the front setback. This error, which caused surveyors to set the foundation stakes incorrectly, was performed on the Appellant's behalf.

The Appellant's situation is not unlike the contractor's in *Cromwell,* where the property owner's contractor applied for a building permit showing the proposed structure to be 14 feet high, and which when completed stood 21 feet high, violating the zoning ordinance's 15-foot height limitation. In that case, the Court held that the Baltimore County Board of Appeals properly denied the requested retroactive variance because it lacked the power to approve a self-created nonconformity. The Court's reasoning in *Cromwell* resonates here. "[H]ad the appell[ant's contractor] used proper diligence ... and then made accurate measurements ... [the

---

[3] The self-created hardship rule, while listed as the third variance criteria in the Section 130.B.2.a, is actually a complement to the first criterion. If the hardship is self-created, then it is not the result of a unique physical condition of the land and therefore fails the test of Section

resultant hardship could have been avoided]. The hardship ... was entirely self-created...." (Internal citations omitted.)

While I recognize that correcting the encroachment may be a greater financial undertaking than if the Petitioner were allowed to maintain the encroaching garage within the setback, I may not take the cost of the work into consideration. "Hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances [of the land], none of which have been proven here. Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program." *Cromwell v. Ward*, 102 Md. App. 691, 715, 651 A.2d 424 (1995), *quoting Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984). As the Appellant's own engineer testified, it would be possible, though not financially desirable, to remedy the encroachment and construct a reasonably sized dwelling within the building envelope without violating the setback restrictions.

The courts have consistently held that any hardship must relate to the land, and not to the personal circumstances of the owner. See 3 Robert M. Anderson, American Law of Zoning, Section 18.30 (2d. ed.). In this case, the practical difficulty in complying with the 50-foot front public street right-of-way setback is personal to the Appellant and does not relate to the land itself. Consequently, the petition does not meet the requirements of Section 130.B.2(3).

Conclusion

While it may be desirable for the Appellant to retain the encroaching garage in its present location, it is not the role of zoning, nor should it be, to accommodate the personal wants or

---

130.B.2.a(1) as well.

circumstances of each property owner. Rather, the purpose of zoning is to promote the orderly development of land through the imposition of uniform regulations and standards. Variances to these standards are therefore to be sparingly granted, and only under exceptional circumstances. *Id.* at 430.

Simply put, if I were to grant a variance to this Appellant to accommodate its desire to allow the encroaching garage in the setback, then I must do so for every property owner who is similarly situated. Once granted, a variance is permanent and irreversible. Under such a system, variances would become the rule, and the Regulations would be rendered meaningless.

Moreover, "it is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of the statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers. That is improper." *Id.* at 441.

The Appellant in this case has not presented sufficient evidence to show that exceptional circumstances exist to warrant the grant of a variance to the setback requirements. Consequently, I am compelled to deny the appeal

ORDER

Based upon the foregoing, it is this **14th Day of February 2008**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of appeal of Owen Kelly, Carrigan Homes, Inc., in BA Case No. 621-D is **DENIED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele LeFaivre

Michele L. LeFaivre

Date Mailed: 2/19/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.